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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1888

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALASKA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 497 F. 2d 1155.The memorandum opinion of the district court (Pet. App. B) is reported at 352 F. Supp. 815. The findings of fact and conclusions of law of the district court (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1974 (Pet. App. D). The petition for a writ of certiorari was filed on June 17, 1974, and was granted on December 9, 1974 (A. 1208). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

If the waters of Cook Inlet in Alaska are historic inland waters under principles of international law, the State of Alaska has jurisdiction over the waters of and lands beneath the Inlet and would be free to proceed with a proposed sale of oil and gas leases covering submerged lands more than three miles from the shore of lower Cook Inlet. If these are not historic inland waters, the portions of the Inlet more than three miles from the shore are high seas and the submerged lands are part of the Outer Continental Shelf, in regard to which the United States has exclusive leasing authority.

The following questions are presented:

1. Whether, despite the absence of any explicit claim to Cook Inlet as inland waters or of any sovereign acts interfering with the navigational rights of foreign nations to innocent passage therein, there has been a sufficient and continuous exercise of sovereignty to establish historic title to Cook Inlet as inland waters.

2. Whether, despite the absence of positive approval or affirmative acquiescence by foreign nations in any exercise of sovereignty over the waters of Cook Inlet as if inland waters, non-opposition of foreign nations was sufficient to establish a claim to historic title.

3. Whether repeated disclaimers of sovereignty over Cook Inlet by the United States should have been denied their normally conclusive effect (a) where the court of appeals found that the evidence presented

"close" questions about the legal inferences to be drawn regarding whether historic title had previously ripened, or (b) because the district court found the disclaimers to be of "low reliability" after investigating the circumstances of their preparation.

4. Whether the "clearly erroneous" test governed the court of appeals' review of the district court's resolution of questions of international law and other legal issues in this case.

STATUTES INVOLVED

Sections 2, 3, 4 and 9 of the Submerged Lands Act of 1953, 67 Stat. 29, *et seq.*, 43 U.S.C. 1301, 1302, 1311, 1312, are set forth in relevant part in the petition (Pet. 3–6).

STATEMENT

Cook Inlet is a deep penetration into the Alaskan shoreline, stretching up from Shelikof Strait and the Gulf of Alaska, beyond Kalgin Island and further on to the City of Anchorage, which lies at the upper end. Between the natural headlands[1] at the Inlet's lower end, the closing line is 47 miles long. Deeper into the mainland, the Inlet narrows to a width of 24 miles, as measured by an imaginary line drawn across the Inlet at Kalgin Island.[2] More than three geographic miles seaward of the 24-mile line at Kalgin

[1] A headland generally is a point of land projecting into the sea, such as a cape.

[2] A map showing Cook Inlet and Shelikof Strait is reproduced as Appendix B to this brief. The map shows the basic boundaries of the portion of Cook Inlet whose status is in dispute.

Island and more than three geographic miles from the shores of Cook Inlet on both sides, lies the area of dispute. Within this area, which the United States considers to be high seas, Alaska offered, in March 1967, 2500 acres of submerged land for a competitive oil and gas lease sale.

On March 20, 1967, the United States brought suit in the United States District Court for the District of Alaska to quiet title and for injunctive relief, on the basis that Alaska is not entitled to lease submerged lands in areas of the high seas (A. 6–8). In response, Alaska contended that all of the waters in Cook Inlet are "historic inland waters" and that Alaska therefore had title to the submerged lands in the entire Inlet (A. 9–10). Alaska based this contention on the Submerged Lands Act of 1953, 43 U.S.C. 1301–1315.[3]

The parties compiled an extensive but essentially undisputed factual record bearing on the controlling question whether these waters of Cook Inlet are historic inland waters. The parties also generally agreed on three broad criteria to guide resolution of this issue: (1) the exercise of authority over the area by the nation claiming the right; (2) the continuity of the exercise of this authority for a considerable time; and (3) the attitude of foreign nations toward the

[3] The Act relinquished to the states the interest of the United States in lands beneath navigable waters of the United States out to a line three miles from the "inland waters" of the United States; the term "inland waters" include "historic bays" that would not otherwise qualify as juridical bays. See *United States* v. *Louisiana*, 394 U.S. 11, 23–24, and pp. 28 to 32, *infra*.

exercise of authority.[4] The parties did not agree, however, on what legal significance, if any, should be attributed to the various events that occurred throughout the history of the Inlet.

1. *The Russian period.* The earliest of these events took place in 1786, during the period of Russian exploration of and interest in the Alaska territory. Inlet (Pet. App. 25a; Def. Ex. HV, following A. fired a cannon shot at an English vessel that had entered lower Cook Inlet (Pet. App. 25a). But the English vessel apparently did not leave the area (Tr. 569) and its distance from the shore is not known.

By the early 1800's at least four Russian settlements existed on the shores of small bays within Cook Inlet (Pet. App. 25a; Def. Ex. HV, following A. 1208). In 1821, the Emperor of Russia issued an edict (a Ukase) purporting to claim sovereignty over, and to exclude foreign vessels from, the waters within 100 miles of "the whole of the northwest coast of America" from the Bering Strait down to 51° north latitude (which includes Cook Inlet), except for vessels compelled to enter those waters by heavy gales or want of provisions (A. 613–614). Both the United States and Great Britain immediately protested the Russian claim, which was unequivocally withdrawn and never enforced (A. 638–639, 667).

In order to resolve the controversy, however, the United States and Great Britain negotiated treaties with Russia (A. 614–619). In Article 4 of the Treaty of 1824 between the United States and Russia, 8

[4] See *United States* v. *Louisiana*, *supra*, 394 U.S. at 23–24, 74–75.

1208). In that year, a Russian fur trader near Port Graham

Stat. 302–305, Russia recognized for a period of ten years the right of the United States to freedom of navigation and fishing in all of the "interior seas, gulfs, harbors and creeks" on the Pacific Coast of North America above 54°40′ north latitude, an area that includes all of Alaska. During the negotiations of the 1824 Treaty, the Russian government admitted that its maritime jurisdiction was limited to three miles from the shore of Alaska (A. 667) and the United States consistently interpreted Article 4 of the Treaty to permit entry into all bays without regard to the location of Russian settlements.[5]

In the Treaty of Cession of 1867, 15 Stat. 539, Russia ceded to the United States "all the territory and dominion now possessed by" Russia in America and "contained within" specified geographical limits extending far into the Pacific Ocean. But the Treaty did not further delineate the extent of that territory and dominion in any way pertinent here.

2. *Seizure of the Kodiak and the Bering Fur Seal Arbitration.* Twenty-five years later, on June 6, 1892, the vessel *Kodiak* and two others (the *Lettie*

[5] *Seal Fisheries in Bering Sea*, S. Ex. Doc. No. 106, 50th Cong., 2d Sess., pp. 240–246, reprinted in part as Ex. 4 (A. 613–630). After Article 4 lapsed, the United States maintained the right to access to all parts of the coast, including bays, except for the points of actual Russian settlement, thereby disputing the Russian claim of authority to exclude fishing and navigation from all bays on whose shores there were Russian settlements (621–630). Even if the Russian claim had been accepted by the United States, it would not necessarily have barred access to all of Cook Inlet, because the claim would presumably have been limited in effect to the small bays along the coast of Cook Inlet on which the tiny settlements were actually located.

and the *Jennie*) were arrested by United States agents more than three miles from the shores of lower Cook Inlet because of alleged violations of Section 1956 of the Revised Statutes, which provided that no person could kill sea otters "within the limits of Alaska territory, or in the waters thereof."[6] All three vessels were American, but only the *Kodiak* was libelled for forfeiture pursuant to Section 1956. In response to the claimant's contention that the United States had no jurisdiction to make a seizure more than three miles from the shore, the district court "presumed" that the agents acted on orders of the government, and concluded that such orders constituted a claim of jurisdiction or dominion involving a "political" matter beyond the power of the court to question.[7] *The Kodiak,* 53 Fed. 126, 128–130 (D. Alaska). The court dismissed the libel, however, after determining that

[6] These arrests were the subject of newspaper stories in Sitka, Alaska (Pet. App. 27a; Pl. Ex. AE) but apparently received no greater public notoriety.

[7] The court based this analysis on dicta in *In re Cooper*, 143 U.S. 472, in which this Court denied an original application for a writ of prohibition to restrain enforcement of a sentence of forfeiture of a foreign vessel based on a violation of Rev. Stat. 1956 in the Bering Sea, on the ground that the claimant could have appealed. *Id.* at 504–513. In the course of the opinion the Court observed that, accepting the claimant's assertion (not confirmed by the record) that the offense and seizure occurred more than three miles from shore, it must be assumed that the officers were "acting under the orders of their government" which "were given in the assertion on the part of this government of territorial jurisdiction over * * * fifty-nine miles from the shores of Alaska * * *." *Id.* at 498–499. However, when a foreign vessel is not involved, as in *The Kodiak*, there is no basis for such an assumption that territorial sovereignty has been asserted (see p. 43, *infra*).

the facts did not show a violation. *Id.* at 130–132.[8] In 1893 federal agents boarded the American vessels *Olga* and *Mary Anderson* twelve miles off Port Graham in lower Cook Inlet because of suspected violations of Section 1956, but no further action was taken (Pet. App. 27a–28a).

British protests concerning the United States' enforcement of Section 1956 against British vessels more than three miles from the shores of the Bering Sea led to the Bering Fur Seal Arbitration. In 1895 the Arbitration Tribunal determined that the United States had not acquired from Russia, and did not have, jurisdiction over the waters of the Bering Sea in Alaska beyond the ordinary three-mile limit (Pet. App. 26a; A. 668). The United States had claimed that its assertion of jurisdiction beyond the three mile limit in the Bering Sea was limited for historical reasons to that area and did not apply to the Pacific Coast of Alaska.[9] While the status of Cook Inlet therefore was not directly involved in the arbitration, there is no evidence that Section 1956 was thereafter enforced beyond three miles from the shores of Cook Inlet—against American or foreign vessels.[10]

[8] It does not appear that enforcement proceedings were instituted against the other vessels (Pl. Ex. AE), the disposition of the *Kodiak* case apparently having governed the disposition of the cases involving the others.

[9] Henderson, *American Diplomatic Questions* 28–29 (1901).

[10] The court of appeals gave a broad construction to the Tribunal's decision, applying it to reverse prior forfeitures involving vessels seized beyond the three-mile limit not only in the Bering Sea (*e.g.*, *La Ninfa*, 75 Fed. 513, 516–517 (C.A. 9)) but also in other waters off the Pacific coast of Alaska (*e.g.*, *The Alexander*, 75 Fed. 519, 520 (C.A. 9) (Gulf of Alaska)), thereby effectively interpretating Rev. Stat. 1956 as applying only to

3. *The Alien Fishing Act of 1906, the Southwestern Alaska Fisheries Reservation, the White Act and the Tariff Commission Maps of 1930.* In 1906, Congress passed the Alien Fishing Act, 34 Stat. 263, which prohibited persons who were not United States citizens from fishing by means other than rod, spear or gaff in "the waters of Alaska under the jurisdiction of the United States."[11] At that time, the United States defined its territorial sea, and hence its jurisdiction, as limited to the waters within three miles from the shore of bays or other shoreline indentations wider than six miles, such as Cook Inlet (A. 13).[12] The legislative history of the Alien Fishing Act indicates that Congress intended the usual three-mile rule to be used in implementing the Act, and no exception for Cook Inlet was mentioned.[13] There is no evidence that the Alien Fishing Act was ever actually enforced against foreign vessels more than three miles from the shores of Cook Inlet, although the opportunity to do so arose, as we discuss below (p. 13, *infra*).

In 1922, President Harding issued an Executive Order[14] creating the Southwestern Alaska Fisheries

"the waters within three miles from the shores of Alaska." *La Ninfa*, *supra*, 75 Fed. at 517.

[11] In the same year, Congress passed another statute for the protection and regulation of the Fisheries of Alaska, 34 Stat. 478, which also concerned "the waters of Alaska over which the United States has jurisdiction."

[12] Cf. *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 122; *Manchester* v. *Massachusetts*, 139 U.S. 240, 258.

[13] See, *e.g.*, H. Rep. No. 2485, 59th Cong., 1st Sess. pp. 3, 7–9.

[14] Executive Order No. 3752, Nov. 22, 1922, Establishing the Southwestern Alaska Fisheries Reservation (A. 676–677).

Reservation and authorizing the Secretary of Commerce to regulate fishing in the Reservation (Pet. App. 29a). The Order applied to "all territorial waters, and lands within one-half mile of the shores thereof." The Order was accompanied by a map enclosing a specified area (including Cook Inlet) by straight lines. But, the lines were not drawn to delineate internal or territorial waters, and the region encompassed included areas of the high seas, thus indicating that the Reservation included only territorial waters that were within the area designated by the lines.

The Secretary of Commerce promulgated regulations purporting to include within the Southwestern Alaska Fisheries Reservation "all the shores and waters of Cook Inlet" (*ibid.*; see A. 687), but to that extent the regulations merely followed the description in the Executive Order without expressly asserting that all of Cook Inlet comprised inland or territorial waters. In 1924 federal fisheries agents enforcing the Executive Order boarded two vessels more than three miles from the shore of lower Cook Inlet. Both vessels, however, were American (Pet. App. 29a–30a; A. 14).

In 1924, Congress enacted the White Act, 43 Stat. 464, another measure to protect Alaskan fisheries, which authorized the Secretary of Commerce (later Interior) to reserve fishing areas in "the waters of Alaska over which the United States has jurisdiction" and made it unlawful to land salmon in the territory of Alaska caught in violation of the Secretary's regulations in "waters outside the jurisdiction of the United States * * *" (Pet. App. 30a). The Secretary's

regulations established fishing districts for management purposes and described the Cook Inlet Area as including all waters of Cook Inlet (Pet. App. 30a–31a; A. 687). In 1924, the United States did not claim jurisdiction in bays, such as Cook Inlet, having headlands further than ten miles apart (A. 13) and there is nothing to indicate that Congress intended to depart from this rule in the White Act. Moreover, neither the White Act nor the regulations thereunder purported to restrict fishing by *foreign* nationals beyond three miles from the shores of Cook Inlet, and there is no evidence of enforcement there against foreign nationals, despite the fact that the United States had the opportunity to do so (see p. 13, *infra*). As the Department of Interior explained, the regulations under the White Act (and other fisheries law in effect between 1924 ant 1959) "defined fishing districts for management purposes only and were not intended to enlarge or extend the territorial waters of Alaska in a legal or jurisdictional sense" (A. 832).

In 1930, in connection with a congressional investigation concerning the entry of fish products into the United States on alien-owned vessels,[15] the United States Tariff Commission prepared maps intended to show the extent of the territorial waters of the United States. The maps showed penetrations of the high seas into Cook Inlet and into other bays in which the United States claimed only a three mile territorial sea (Pet. App. 35a). The Commission destroyed the maps at the re-

[15] S. Res. 314, 71st Cong., 2d Sess.; 72 Cong. Rec. 12376.

quest of the Secretary of Commerce, who thought they constituted an invitation to foreign fishery interests to invade unspecified areas that had theretofore been fished only by United States nationals (*ibid.*). Cook Inlet was not clearly identified as one of those areas (A. 894–895).

4. *Patrol and Enforcement.* During the period from 1941 to 1959, and to a lesser extent before then, federal agents patrolled lower Cook Inlet by boat and plane enforcing federal fisheries laws and regulations (Pet. App. 31a–32a, 34a–35a), as well as international obligations of the United States, dating from as early as 1911 and applying both to the territorial waters of the United States and to the high seas.[16]

[16] In 1911, the United States entered into a convention with Russia, Japan, and Great Britain, for the protection of fur seals and sea otters in the North Pacific waters, which forbade the hunting of such animals by nationals of the parties beyond the three-mile limit of territorial waters, and which obliged the United States to patrol areas frequented by the animals to enforce the Convention. 37 Stat. 1542. In the Act implementing the convention, Congress prohibited United States nationals from killing fur seals in those waters, directed the President to cause patrols to operate there, and authorized seizure of vessels suspected of violation of the Convention or the Act, whether they be "in port, or in territorial waters of the United States, or on the high seas * * *." 37 Stat. 499–5001. Pursuant to this Act, President Harding issued Executive Orders Nos. 3816 and 3988, in 1923 and 1924, respectively, directing the Bureau of Fisheries to patrol waters frequented by the animals and to search and seize any United States vessel suspected of violating the Convention, whether "in port or in territorial waters of the United States or in the high seas * * *" (A. 767–768).

In 1923, the United States and Great Britain entered into a similar Convention concerning halibut fishing on the high seas and in the territorial sea off the portion of the Pacific coast

At various times in the 1940's and 1950's Canadian vessels fished in Cook Inlet for halibut (A. 804–827). In 1952, federal agents responsible for enforcing the Alien Fishing Act of 1906 and other fisheries laws detected Canadians fishing for halibut in the area of lower Cook Inlet at issue in this case. On orders of their superiors, however, the federal agents declined to interfere or to enforce the Act because the vessel was foreign and was located beyond the three-mile limit to United States jurisdiction (A. 16, 226–228, 552–554; see A. 772–776, 802, 803).

Also in 1952, the Regional Director of the Alaska Region of the United States Fish and Wildlife Service indicated that federal laws such as the White Act "can be made to apply to our nationals whenever they are on the high seas, at least if they are sailing under our flag" (A. 772). The understanding in regard to lower Cook Inlet that federal fishing laws might be

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including Cook Inlet. 43 Stat. 1841. In the Northern Pacific Halibut Act implementing the Convention, Congress made it unlawful, during the closed season, for any person to fish for halibut in the territorial waters of the United States (defined as "the waters contiguous to the western coast of the United States and * * * Alaska"), and for any United States national to do so in those waters, or in the territorial waters of Canada, or in the high seas. 43 Stat. 648–649. The Act also directed the President to maintain a patrol "in such * * * waters as to him shall seem expedient" and authorized searches of any vessels suspected of violations of the Act in the territorial waters of the United States, and of United States vessels suspected of violations on the high seas. Pursuant to the Act, President Coolidge issued Executive Orders Nos. 4098 and 4983, in 1924 and 1928, respectively, ordering the Bureau of Fisheries to patrol "the territorial waters of the United States and the high seas * * *" (A. 769–770).

enforced there against United States citizens but not against foreign nationals was made clear the following year in a memorandum of the National Director of the United States Fish and Wildlife Service, concurring in the opinion of the Solicitor of the Department of Interior, informing the Alaska Regional Director that (A. 803):

> To the best of my knowledge, Cook Inlet has not been claimed as an historic bay and, thus, it would seem unwise to take any action against foreign vessels fishing beyond the territorial waters of Alaska, *i.e.*, 3 miles. This is particularly true in view of the numerous claims and counterclaims which have been made by the United States and countries to the south regarding the extent of territorial jurisdiction. With respect to United States vessels, I am inclined to feel that we should attempt to regulate their fishing operations in Cook Inlet and similar areas. While the Alaska Commercial Fisheries Acts refer only to territorial waters, the basis of their application to citizens may be quite different from that involved in their application to foreign vessels.[17]

In the period from 1951 to 1957, federal agents seized at least one American vessel and arrested at least six Americans more than three miles from the shores of lower Cook Inlet for alleged violations of fisheries regulations (Pet. App. 33a–34a). All but two of the cases, however, were dismissed (A. 224, 366, 373, 460, 488, 530).

[17] When asked about this memorandum twenty years later, the former National Director, who was then 74, did not recall espousing the position stated in the memorandum (A. 267, 273–275). The authenticity of the memorandum is not in dispute, and, as noted above, the actions of the officials involved were consistent with the memorandum.

In 1956, and again in 1957, the federal fisheries regulations were revised, but included within "the waters of Alaska" to which they applied all of Cook Inlet as well as other areas beyond the territorial seas of the United States (Pl. Ex. 76, p. 26). (The regulations for the protection of fisheries in Alaska that had been issued by the Secretaries of Commerce and Interior from 1924 to 1956 pursuant to a variety of statutes and international agreements defined the Cook Inlet Area as including "Cook Inlet, its tributary waters, and all adjoining waters north of Cape Douglas and west of Point Gore" (Pl. Ex. 25, p. 8; A. 1171, 1178), which encompasses the area of lower Cook Inlet in dispute here.)[18]

[18] As stated in the text, from 1924 to 1956, the regulations issued by the Secretaries of Commerce and Interior for the protection of the fisheries of Alaska, pursuant to a variety of statutes and international agreements, defined the Cook Inlet Area as including "Cook Inlet, its tributary waters, and all adjoining waters north of Cape Douglas and west of Point Gore" (*e.g.*, A. 1171, 1178). Describing the Cook Inlet area as the only one not limited to "territorial coastal and tributary waters" during that period, the district court concluded that the regulations constituted an assertion of territorial sovereignty over all of Cook Inlet (Pet. App. 31a). That the regulations did not constitute such an assertion is clear from the fact that during that same period the regulations described other areas (*e.g.*, Yukon Kuskokwim, and Resurrection Bay (Def. Ex. IU)) so as to include the high seas portion of bays having entrance points wider than the ten miles then recognized by the United States as the limit on inland water bays (A. 13). Moreover, since 1924 the description of the Aleutian Islands Area (*e.g.*, A. 1171) included all of Unimak Pass, an international strait which the United States regards as high seas. In 1956 the reference to "territorial coastal and tributary waters" was omitted from the description of the Kodiak area, which was defined to include all waters of Sheli-

5. *The Gharrett-Scudder Map.* Later in 1957, representatives of the United States and Canada met to discuss a proposal to prohibit citizens of the two countries from fishing for salmon with nets on the high seas. When the option whether to use the same lines specified in the Department of Interior regulations was considered, the Canadian representatives asked to see a map depicting the "waters of Alaska" referred to in the applicable regulations. Interior Department employees Gharrett and Scudder prepared such a map, in which the "waters of Alaska" were enclosed by straight baselines (a method not used by the United States in describing its territorial sea for international purposes (cf. *United States* v. *California,* 381 U.S. 139, 167–169)) and included all of Cook Inlet, as well as other waters not previously claimed by the United States as being within the limits of its territorial sea (Pet. App. 35a–37a; cf. A. 13). The United States transmitted charts reflecting the Gharrett-Scudder line (Pl. Ex. GH–1 to BH–12, following A. 1208) to Canada accompanied by a disclaimer stating that they were not intended to enlarge or extend territorial waters in a legal and jurisdictional sense

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kof Strait (A. 1175, 1178), which the United States regards as high seas, and from description the Bering River-Yakataga Area, which was also defined to include an area of high seas more than three miles from the Alaskan line (A. 1178). Finally, in 1957 the definition of every district was revised so that the Cook Inlet area and all other areas were described in terms of "waters of Alaska," defined in pertinent part as "those extending three miles seaward * * * from lines extending from headland to headland across *all* bays, *inlets*, *straits*, passes, sounds and entrances * * *" (Pl. Ex. 72, p. 26; emphasis supplied; see Pet. App. 35a), without regard to the international status of such waters.

(A. 294–295, 589, 834, 837, 869). There was no evidence that the Gharrett-Scudder charts were ever publicized or distributed to other countries, and the charts were not generally known to American interests (A. 348–349).

6. *Statehood and the Shelikof Strait Incident.* Pursuant to the Alaskan Statehood Act, enacted July 7, 1958, Alaska was admitted into the Union on January 3, 1959, on the basis that the state "shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." Section 2, 72 Stat. 339, 48 U.S.C. ch. 2, note. On January 1, 1960, Alaska assumed control of the fisheries formerly within the jurisdiction of the federal government under the Alien Fishing Act and the White Act (Pet. App. 37a). In its fishing regulations, however, Alaska maintained essentially the same definitions of Alaskan waters and the Cook Inlet Area as had been set forth in the prior federal regulations (Pet. App. 37a; 5 Alaska Admin. Code 109.02 (1959); (A. 892).

In March 1962, the 1770-ton Japanese mothership, the *Banshu Maru 31,* arrived at the Kodiak fishing grounds to search for schools of herring. Accompanying the mothership were five other vessels. On April 5, 1962, the fleet sailed north of the Barren Islands and into Cook Inlet in search of herring (A. 53–55, 838–840; Pl. Ex. 116).

The next day, after leaving Cook Inlet without incident, the Japanese fleet engaged in fishing operations in the Shelikof Strait (A. 43–56; A. 840–863). Ten days later, Alaskan agents boarded some of the Japa-

nese vessels, which were then well into the Strait, more than 75 miles from the nearest portion of Cook Inlet (see App. B, *infra*); the Japanese captains were arrested and charged with violating Alaska fishing regulations applicable in the area (see Pet. App. 39a–40a; 82a; A. 859, 1163).[19] Although they had earlier entered Cook Inlet (cf. A. 1202), they were not charged with violating Alaska's regulation's pertaining to the Inlet. Contrary to the instructions of their employer and without the approval of the Japanese Government (A. 60–61; App. A, *infra,* 3A), the Japanese fishermen signed a statement assuring Alaska that they would not fish in an area including the Shelikof Strait and bounded by the Barren Islands, midway across the entrance to Cook Inlet (Pet. App. 40a; A. 1186–1188).

The Japanese government immediately protested the seizures and the assertions by Alaska that it had sovereignty over Shelikof Strait and Cook Inlet, and disassociated itself from the commitment made by the fishermen (Pet. App. 41a; App. A, *infra,* 3A). Alaska declined to prosecute, and later dismissed all charges, as Japan had requested (Pet. App. 40a–41a; A. 11–12; App. A, *infra,* 3A), and the United States has never expressly endorsed the actions of Alaska (Pet. App.

[19] At least one of the Japanese vessels was within three miles from the coast of Alaska (Pet. App. 40a).

[20] The State Department's official reply to the Japanese note of protest indicated that there was some question concerning the exact location of the vessels when they were seized, and that it could not be determined whether they were on the high seas or within the territorial jurisdiction of Alaska until the conclusion of then-pending court proceedings (A. 1155–1156).

17a, 42a).[20] The record shows no subsequent entry of Japanese vessels into Cook Inlet (Pet. App. 44a).

7. *Disclaimers by the United States.* Less than one month after the Shelikof Strait incident, the Legal Adviser for the State Department rendered an opinion in regard to the status of Cook Inlet as an historic bay, which the Solicitor of the Department of the Interior had requested.[21] After considering the elements of the historic claim asserted by the Attorney General of Alaska, the Legal Adviser concluded: "There is no basis for the assertion by Alaska of a claim to all of Cook Inlet as historic waters."[22] In further correspondence with the Department of Justice in 1969, after this lawsuit had begun, the State Department Legal Adviser reported that "[i]n its conduct of foreign relations the Department of State does not consider that Cook Inlet is an historic bay" (A. 758–760). And, in April 1971, the United States

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Because of the eventual dismissal of those proceedings, the incident passed without a definitive diplomatic resolution. The district court noted the testimony of the Governor of Alaska that President Kennedy had made a passing comment, during a brief discussion of the Shelikof Strait seizures, that the Governor "did the right thing" (Pet. App. 41a; A. 217–218), but that comment did not mention Cook Inlet. As the record indicates in regard to an analogous incident, because of diplomatic and other considerations the absence of a formal repudiation of Alaska's actions cannot readily be equated with the United States' endorsement thereof (A. 878–881).

[21] The request for an opinion had been precipitated by the fact that Alaska had asserted that lower Cook Inlet was inland waters in which it had authority to make oil and gas leases (A. 755).

[22] Letter from Abram Chayes, Legal Adviser, Department of State, to Frank J. Barry, Solicitor, Department of the Interior, May 3, 1962 (A. 755–757).

published a set of maps delimiting its territorial sea and certain inland waters. These maps, which were distributed to foreign governments, indicated that the portion of Cook Inlet in dispute here was high seas (A. 326–327, 761).[23]

8. *The 1970 Arrests.* On July 6, 1970, also after this suit had begun, Alaska arrested, as they landed in Alaska, two non-Alaskan residents of the United States who had violated Alaska's regulations while fishing more than three miles from the shore in lower Cook Inlet in Alaskan boats. The fishermen were prosecuted for landing fish caught in violation of the regulations, but the cases were dismissed (Pet. App. 38a–39a; A. 165–173, 1191, 1196).

Neither the United States nor foreign nations protested any exercise of fisheries jurisdiction by Alaska over the waters of Cook Inlet more than three miles from the shore (Pet. App. 38a), but it does not appear that such jurisdiction has ever been exercised against foreign nationals.

9. *The Decisions of the District Court and the Court of Appeals.* On the basis of evidence summarized above, the district court, on December 14, 1972, concluded that, for purposes of the governing international law, the various events occurring when Russia owned the territory of Alaska, as well as the actions taken by the United States (through statutes,

[23] When the Governor of Alaska wrote to the President of the United States questioning the publication of these maps, the State Department responded that the maps were drawn consistently with United States policy, which had been carefully developed (A. 884–887).

regulations and actions of its employees) and the State of Alaska, constituted the requisite exercise of sovereignty over lower Cook Inlet, and that the various acts or omissions of foreign nations constituted acquiescence in those assertions of sovereignty (Pet. App. 14a–19a, 25a–45a). In the court's view, the "earliest clear assertion of sovereignty over the disputed waters occurred in 1906 when Congress enacted the Alien Fishing Act" (*id.* at 14a–15a); and the "clearest exercise of sovereignty occurred in the Shelikof Strait in 1962" (*id.* at 16a). The district court held, therefore, that all of the waters of Cook Inlet are historic inland waters. Without specifying when that historic title ripened, the court indicated that evidence of Canadian fishing as early as 1943 and the United States' disclaimer in 1962 could be disregarded as events that occurred after the emergence of historic title (*id.* at 19a, 45a), but the court relied upon events occurring during the 1950's, and as late as 1970, as assertions of sovereignty over lower Cook Inlet giving rise to historic title (*id.* at 16a–17a, 30a–43a). In reaching this result, the court also disregarded the disclaimers by the United States (the first of which antedated this litigation) that it did not regard the disputed area of lower Cook Inlet as within its jurisdiction, because it concluded that the extent of research underlying the disclaimers made them of "low reliability" (*id.* at 12a, 45a–47a).

On appeal, the United States did not challenge the basic factual findings made by the district court. Rather, it contended that in determining that sovereignty had been continuously exercised over Cook

Inlet and that foreign states had acquiesced in the exercise of such sovereignty, the district court had attributed improper legal significance to various events that indisputably occurred—in short, that the court had applied erroneous legal standards. In addition, the United States contended that the district court erred in failing to regard as legally conclusive the United States' disclaimers of sovereignty over Cook Inlet. Without discussing the legal issues raised by the United States, the court of appeals affirmed *per curiam* on the ground that the district court's "findings" were not "clearly erroneous" (Pet. App. 5a-6a).

On May 14, 1974, on the government's motion, the court of appeals recalled its mandate to the extent that it affects foreign fishing and navigation in the disputed area and stayed issuance of the mandate until June 13, 1974, or until final disposition of this case if a petition for a writ of certiorari were filed (Pet. App. 58a). On June 14, 1974, the court of appeals extended that stay until June 23, 1974 (A. 1207), by which date the petition has been filed.

SUMMARY OF ARGUMENT

1. Alaska's asserted right to authorize oil and gas drilling in the lands beneath lower Cook Inlet is based upon the Submerged Lands Act of 1953, 43 U.S.C. 1301, *et seq.*, pursuant to which Alaska, by virtue of the Alaska Statehood Act, has "the same rights as do existing States thereunder." 72 Stat. 343. The Submerged Lands Act confirmed to each state admitted after the formation of the Union a seaward boundary

three miles from its "coast line," defined with reference to the seaward limit of its "inland waters," and vested in the state the United States' title to the lands beneath navigable waters within the state's boundaries. 43 U.S.C. 1301(c), 1311(a), (b), 1312.

The Act does not define "inland waters," but this Court has adopted the international rules set forth in the Convention on the Territorial Sea and the Contiguous Zone. *United States* v. *California, supra,* 381 U.S. at 161–167; *United States* v. *Louisiana,* 394 U.S. 11, 16–17, 32–35. Under the Convention, the disputed portion of lower Cook Inlet (*i.e.,* that more than three miles from the shore and from an imaginary 24-mile line across the Inlet at Kalgin Island) can be regarded as inland waters only if Alaska can establish that Cook Inlet is covered by an exception for "historic" bays.

Since the Convention does not define "historic" bays, this Court has looked to the definition of "historic waters" under international law set forth in a United Nations study (*Juridical Regime of Historic Waters, Including Historic Bays*) and has held that, for purposes of the Submerged Lands Act, a state's claim of historic title to inland waters should be treated as if made by the United States and opposed by other nations. *United States* v. *Louisiana, supra,* 394 U.S. at 23–24, 74–75.

In that context, Alaska had the burden of establishing three factors recognized as elements of historic title: (1) the exercise of authority over the area in question by the United States or Alaska; (2) the con-

tinuity of that exercise for a considerable period of time; and (3) the acquiescence therein by foreign nations. Those factors must be considered against the background of the longstanding foreign policy position of the United States of opposing seaward expansions of jurisdiction by other nations.

2. The historic title established by the exercise of sovereignty is commensurate with the nature of the sovereignty asserted. A nation's exercise of sovereignty over coastal waters as over its territorial sea would not establish historic title to the waters as inland waters. There must be an exercise of sovereignty as over inland waters.

The crucial distinction between inland waters and the territorial sea is that, while in both a nation may regulate or even prohibit foreign fishing, only in inland waters may the nation interfere with or bar the right of innocent passage of foreign vessels.

There is no evidence in this case that either Russia, the United States or Alaska ever interfered with innocent passage of foreign vessels in Cook Inlet. To the contrary, the record shows that foreign vessels were permitted to transit and stop in the disputed area of lower Cook Inlet, and indeed foreign vessels fished there at various times since the early 1940's without hindrance. The failure of the United States to exercise inland water sovereignty weighs heavily against the ripening of a claim of historic title to Cook Inlet as inland waters.

The courts below improperly disregarded these events on the grounds that they were "infrequent" and

that historic title to Cook Inlet as inland waters had already ripened. That conclusion was based on various statutes, regulations and enforcement actions of the United States and Alaska concerning fishing in Cook Inlet and other waters of Alaska—many of which occurred after the date (never clearly specified) when historic title was held to have ripened. In any event, such assertions of sovereignty were consistent with treatment of the disputed portion of Cook Inlet as territorial seas, at best, or even high seas, for foreign fishing may be regulated in the territorial sea and the United States may regulate fishing by United States nationals even in the high seas. See *Skiriotes* v. *Florida,* 313 U.S. 69, 73–77. The patrolling of lower Cook Inlet on which the court relied was irrelevant for the additional reason that the United States was obligated by statutes and international agreements to patrol even the high seas off Alaska to enforce various fisheries regulations.

The court found the "clearest" exercise of sovereignty in Alaska's seizure of Japanese fishing vessels in Shelikof Strait in 1962, but that was not an assertion of sovereignty concerning Cook Inlet (the nearest portion of which was some 75 miles from the seizure) and it too occurred after the purported ripening of title to Cook Inlet as inland waters.

Since there have been no relevant acts of sovereignty over Cook Inlet as inland waters, it follows *a fortiori* that the requisite sovereignty has not been exercised continuously for a considerable period of time. Any continuity was interrupted, moreover, by

the periodic incursions of foreign vessels who fished unmolested in Cook Inlet.

3. The courts below also erred in concluding that foreign nations had acquiesced in the exercise of sovereignty over Cook Inlet as over inland waters. A necessary prerequisite for a claim of acquiescence based on the acts (or inaction) of foreign nations is that the coastal nation must have openly, notoriously, and unambiguously indicated, by act or declaration, that it was intending to exercise inland water sovereignty. In its foreign relations, the United States adheres firmly to the position that claims of sovereignty cannot be based on domestic legislation or regulations, or secret, unpublicized events, and foreign nations would not regard such matters as constituting assertions of sovereignty by the United States unless that intention were unmistakably clear. Here no such intention has been shown in regard to any of the purported acts of sovereignty as to which foreign nations are said to have acquiesced.

To the contrary, when inland water sovereignty was clearly asserted—by Alaska at the time of the Shelikof Strait seizure and by decision of the court of appeals itself—Japan and Canada, respectively, protested.

4. The courts below failed to give proper weight to the fact that the United States has repeatedly disclaimed title to Cook Inlet as inland waters. Determination of this country's boundaries is a foreign policy matter reflecting a variety of considerations in addition to what might be argued on the basis of past events, and is ordinarily not subject to judicial review. Yet the ruling of the courts below that Cook Inlet is

inland waters of Alaska is contrary to and overrides *pro tanto* the determination of the responsible members of the Executive Branch that Cook Inlet is not inland waters of the United States. This Court has indicated that such a disclaimer might not be decisive where it is "clear beyond doubt" that historic title has ripened, so that giving effect to the disclaimer would contract a state's existing territory. *United States* v. *Louisiana, supra,* 394 U.S. at 74, n. 97, 77, n. 104. However, where there is room for argument about the inferences to be drawn from the historic record—and that is the most that could be said for Alaska's claim here—the disclaimer governs.

In addition, the court also erred in looking behind the face of the disclaimers and rejecting them because of the court's assessment of the amount or quality of research underlying them. The court should only have been concerned with the fact that a disclaimer—a foreign policy determination—had been made.

ARGUMENT

The lower courts erred in holding that lower Cook Inlet is historic inland waters. The outer limits of inland waters determine the international coastline of the United States,[24] but neither this country nor any other nation may freely designate its own seaward boundaries without causing international consequences.[25] The dispute regarding whether Cook Inlet

[24] *United States* v. *California, supra,* 381 U.S. at 162.

[25] *United States* v. *California,* 332 U.S. 19, 25: "But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge

is historic inland waters, as the state contends and the lower courts held, or high seas, as the United States maintains, is thus not simply a domestic controversy. A determination of the status of lower Cook Inlet must take account of the international dimensions of the issue.

A. WHETHER ALASKA HAS HISTORIC TITLE TO LOWER COOK INLET AS INLAND WATERS MUST BE DETERMINED IN VIEW OF SETTLED PRINCIPLES OF INTERNATIONAL LAW AND THIS COUNTRY'S TRADITIONAL FOREIGN POLICY AGAINST SEAWARD TERRITORIAL EXPANSIONS

1. THE SUBMERGED LANDS ACT AND THE MEANING OF "INLAND WATERS"

International law recognizes a threefold division of the sea: (1) "inland" or "internal" waters,[26] consisting of bodies of water, such as bays, partly within the land territory of a nation, and over which it may exercise complete sovereignty, including the right to exclude foreign vessels; (2) the "territorial" or "marginal" sea, consisting of the waters within a specified distance seaward (three geographic miles for the United States) of the shore and inland waters of a nation, and over which it may exercise complete sovereignty, except that foreign vessels have the right of "innocent passage" through such waters upon observ-

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detracts from it, is a question for consideration among nations as such, and not their separate governmental units."

[26] These terms are synonymous; "inland waters" is used in the Submerged Lands Act (43 U.S.C. 1301(c); see p. 30, *infra*), and "internal waters" in the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 [1964], 15 U.S.T. 1606, 1609, T.I.A.S. No. 5639 (see p. 31, *infra*).

ance of special regulations concerning navigation, customs and the like; and (3) the "high seas," lying seaward of the territorial sea and in which a nation may not normally exercise sovereignty with regard to foreign vessels or foreign nationals (although it may as to its own nationals (cf. *Skiriotes* v. *Florida, supra,* 313 U.S. at 73–74, 76–77)). *United States* v. *Louisiana, supra,* 394 U.S. at 22–23; see generally I Shalowitz, *Shore and Sea Boundaries* 22–25 (1962). In the portion of the high seas adjacent to the territorial sea, known as the "contiguous zone," a coastal nation may exercise control for certain special purposes. See generally I Shalowitz, *supra,* at 238–241. Within that zone the United States has established exclusive fisheries jurisdiction between three and twelve miles from its coastline. 16 U.S.C. 1091, *et seq.*

Thus, as one moves landward through the respective zones, the extent of sovereignty of the coastal nation increases while the rights of other nations diminish. An assertion that particular waters are inland waters is tantamount to an assertion that foreign vessels are not free to enter. If such an assertion is upheld, it will also set the territorial boundaries of the nation.

In the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301–1315, Congress relinquished[27] to the

[27] Six years earlier, in *United States* v. *California, supra,* 332 U.S. at 805, this Court had decided that the United States was "possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles."

states "title to and ownership of the lands beneath the navigable waters within the boundaries of the respective States." 43 U.S.C. 1311(a). The Act confirmed to each state admitted after formation of the Union a seaward boundary of three geographic miles from its "coast line." 43 U.S.C. 1312. Each state's "coast line" was defined with reference to the seaward limit of its "inland waters." 43 U.S.C. 1301(c). The Act does not define "inland waters."

Although Alaska was not admitted to the Union until January 3, 1959, and hence was not a "state" in 1953 for purposes of the Act (43 U.S.C. 1301(g)), the Alaska Statehood Act provided that the Submerged Lands Act shall be applicable to Alaska and that Alaska "shall have the same rights as do existing States thereunder." Section 6(m), 72 Stat. 343, 48 U.S.C. ch. 2, note.

In regard to the natural resources in the portions of the continental shelf lying seaward and outside the boundaries of the states, the Submerged Lands Act confirmed that these were under the jurisdiction and control of the United States. 43 U.S.C. 1302. And in the Outer Continental Shelf Lands Act,[28] Congress again declared that the United States owned all submerged land in the continental shelf seaward of the lands granted to the States.[29]

2. THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE AND THE MEANING OF "HISTORIC" BAYS

Since the Submerged Lands Act did not define "inland waters," the responsibility for supplying a defi-

[28] 67 Stat. 462, 43 U.S.C. 1331, *et seq.*

[29] See *United States* v. *California*, *supra*, 381 U.S. at 148.

nition fell to this Court. In performing this task, the Court adopted the international rules defining inland waters set forth in the Convention on the Territorial Sea and the Contiguous Zone, which was signed in 1958 and ratified by the United States in 1961, and entered into force in 1964.[30] *United States* v. *California, supra,* 381 U.S. at 161–167; *United States* v. *Louisiana, supra,* 394 U.S. at 16–17, 32–35. Under Article 7 of the Convention, which applies to bays,[31] a "bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast."

However, if the distance between the natural entrance points of a bay exceeds 24 miles, "a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length." Only those waters landward of the 24-mile line are inland waters.

The entrance to Cook Inlet is 47 miles wide and the 24-mile line prescribed by the Convention would be drawn further into the mainland, across the Inlet at Kalgin Island. If only the foregoing provisions of Article 7 were considered, there would thus be no doubt that the portion of Cook Inlet in dispute here,

[30] 15 U.S.T. 1606, T.I.A.S. No. 5639. The Convention was the product of many years of work by the International Law Commission established by the United Nations General Assembly in 1947 to codify international law. See I Shalowitz, *supra*, at 203–211.

[31] Article 7 is fully set out in *United States* v. *California, supra*, 381 U.S. at 169, n. 36.

which lies seaward of the line at Kalgin Island (see App. B, *infra*), is not inland waters. However, the concluding paragraph of Article 7 states that the "foregoing provisions shall not apply to so-called 'historic' bays * * *."

The question thus becomes whether Cook Inlet is an "historic" bay, for this Court has recognized that "inland waters" include historic bays for purposes of the Submerged Lands Act. *United States* v. *California, supra,* 381 U.S. at 172; *United States* v. *Louisiana, supra,* 394 U.S. at 23. But since the Convention itself does not define "historic" bays, the Court has looked to the comprehensive definition set forth in an extensive United Nations study entitled *Juridical Regime of Historic Waters, Including Historic Bays,* 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/143 (1962) (A. 729–754)). See *United States* v. *California, supra,* 381 U.S. at 172–175; *United States* v. *Louisiana, supra,* 394 U.S. at 23–24, 74–75.

While "there is no universal accord on the exact meaning of historic waters" (*United States* v. *Louisiana, supra,* 394 U.S. at 75), the *Juridical Regime* notes that there is general agreement on at least three factors that must be established: (1) the exercise of authority over the area by the nation claiming the right; (2) the continuity of the exercise of this authority for a considerable time; and (3) either the acquiescence or the absence of opposition of other nations. See *id.* at 23–24, n. 27, 75, n. 102. The party claiming historic title has the burden of proving these special circumstances in order to allow a departure from

the usual geographical test for inland waters, *Juridical Regime* ¶¶ 149–159, 188 (A. 749–751, 753).

3. THE EFFECT OF TRADITIONAL UNITED STATES FOREIGN POLICY AGAINST SEAWARD TERRITORIAL EXPANSIONS

Although the Convention and its recognition of "historic" bays was designed to deal with international affairs rather than domestic disputes, state exercises of dominion are "relevant to the existence of historic title." *United States* v. *Louisiana, supra,* 394 U.S. at 77. But in view of the effect on international boundaries, the Court has instructed that the only way to apply the concept of "historic" bays to domestic controversies "is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation." *Ibid.* This, we submit, the courts below failed to do properly.

Traditionally the United States has attempted to limit national claims in the oceans of the world.[32]

[32] See, *e.g.*, 4 *Foreign Relations of the United States, 1937*, pp. 754–756 (1954); Jessup, *The Pacific Coast Fisheries*, 33 Am. J. Int'l. L. 129, 134 (1939); Letter from Secretary of State Cordell Hull to Josiah W. Bruley, Chairman of the Senate Committee on Commerce, dated September 15, 1943 (Pl. Ex. 45); Letter from the Department of the Navy on Behalf of the Department of Defense to Emanuel Celler, Chairman, Committee on the Judiciary, House of Representatives, dated April 25, 1952 (Pl. Ex. 50); Letter from Secretary of State John Foster Dulles to Attorney General Herbert Brownell, dated June 15, 1956 (Pl. Ex. 106); 4 Whiteman, *Digest of International Law* 217–218 (1965); H. Rep. No. 2086, 89th Cong., 2d Sess., pp. 4, 14–15; President's Report to the Congress, "United States Foreign Policy for the 1970's: A New Strategy for Peace, in 6 *Weekly Compilation of Presidential Documents* 194, 226 (1970); Letter from Under Secretary of State John N. Irwin, II, to William

Over the years, this country has resisted claims to the seas whether made by attempts to enlarge the breadth of the territorial sea or by attempts to move seaward the limit of inland waters. The position of the United States that lower Cook Inlet is not inland waters is consistent with our foreign policy, for we could less readily oppose claims by other nations if we were extending our own territorial jurisdiction.

From this traditional policy of the United States, which the courts below failed even to recognize, a number of important propositions follow. The policy itself must weigh heavily against any claim by a coastal state, such as Alaska, that actions of the federal government gave rise to historic title. The exercise of national sovereignty over waters that otherwise would be high seas is against our declared foreign policy. Other nations of the world are and have been aware of our position regarding territorial expansions in the seas, and only the most clear, direct and long-standing assertions of sovereignty would alert them to a departure from our normal attitude. This is why the Court has required, as a prerequisite to establishing that waters are historic bays, the more stringent requirement that foreign nations actually acquiesce in the exercise of jurisdiction rather than merely fail to oppose it.[33] Moreover, in light of our traditional

A. Egan, Governor of Alaska, dated December 22, 1971 (A. 884-887).

[33] In *United States* v. *Louisiana*, *supra*, 394 U.S. at 24, n. 27, the Court, although noting the split in viewpoints regarding whether mere absence of opposition or actual acquiescence was necessary, reiterated the position stated in *United States* v. *California*, *supra*, 381 U.S. at 172, that there must be "acquiescence."

policy and the instruction that a claim, such as Alaska's, must be viewed as if it were asserted by the United States and opposed by foreign nations (see p. 33, *supra*), disclaimers of jurisdiction by the United States must be considered conclusive in the absence of evidence "clear beyond doubt" that historic title has already ripened (see pp. 54–55, *infra*) even when made during the pendency of a lawsuit between a state and the United States over historic title.[34] In addition, for these reasons, as well as others we discuss below, neither the internal governmental regulations of the United States and the states nor actions pursuant to them against American citizens can be relied upon as exercises of sovereignty. Only actual enforcement actions directed against foreign citizens or foreign governments can be considered in this regard.

With this in mind, we next discuss the matters relied upon by the courts below to support their conclusion that lower Cook Inlet is part of an "historic" bay. We emphasize again that the dispute here is not over the evidence itself but its relevance and significance to the inquiry at hand.[35]

[34] The disclaimers given effect in *United States* v. *California*, *supra*, 381 U.S. at 163, 175, consisted of the position asserted by the United States in briefs filed in this Court in that litigation.

[35] Accordingly, this is not a case in which the Court must follow the rule barring review of "concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275. We accept the findings of fact of the district court; we do not accept the court's conclusions regarding the relevance and importance of those facts.

B. THERE HAS BEEN NO RELEVANT EXERCISE OF SOVEREIGNTY OVER THE WATERS OF LOWER COOK INLET TREATING THAT AREA AS INLAND WATERS

1. ALASKA'S CLAIM THAT COOK INLET IS HISTORIC INLAND WATERS CAN BE SUPPORTED ONLY BY ASSERTIONS OF SOVEREIGNTY AS OVER INLAND WATERS

The first factor to be considered in determining whether certain waters are an historic bay is the exercise of authority over the area by the claiming nation. See p. 32, *supra*. But in order for lower Cook Inlet to be considered part of an historic bay, and hence inland waters, more is required than merely the exercise of some sovereignty over the area. Careful attention must be paid to the *scope* of the sovereignty asserted since even if some historic title ripened, it may not be to inland waters. As this Court stated in *United States* v. *Louisiana*, *supra*, 394 U.S. at 24, n. 28, "Historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area." Immediately after the cited passage, the Court quoted the following statement from the *Judicial Regime* ¶ 164 (A. 751): "If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea."

Of course, if the Court decides that no historic title of any kind ripened in regard to lower Cook Inlet, which is what we contend, then the only portion of the Inlet that would comprise territorial sea would be the area three geographic miles from the shores of the

Inlet (and the closing lines of rivers and small bays opening into the Inlet) and from the 24-mile line at Kalgin Island.[36] But perhaps it is unnecessary to go so far. For the most that can be said for the events relied upon by Alaska is that, although they might at best establish a claim to lower Cook Inlet as an historic territorial sea,[37] they do not establish that the area is historic inland waters.[38]

[36] See Submerged Lands Act, 43 U.S.C. 1312, allowing each state to extend its seaward boundary three miles from its "coast line," which is defined as the low water part of the coast in contact with the sea and the line marking the seaward limits of inland waters. 43 U.S.C. 1301(c).

[37] Alaska argues that the concept of historic territorial sea as applied to bays "is surely a figment of imagination" (Br. in Opp. 7). However, the Gulf of Fonseca in Central America is an example of an historic territorial sea within a bay-shaped area. See *Historic Bays. Memorandum by the Secretariat of the United Nations*, U.N. Doc. No. A/Conf. 13/1, ¶ 132–133 (1957) (A. 717). Further, this Court has recognized the concept and settled principles of international do so as well (see p. 36, *supra*). The passage from the *Juridical Regime* which the Court quoted makes this plain when it and the next paragraph of the United Nation's study are set out in full (A. 751):

> 164. On the other hand, it should be recalled that the right to "historic bays" is based on the effective exercise of sovereignty over the area claimed, together with the general toleration of foreign States. The sovereignty exercised can be either sovereignty as over internal waters or sovereignty as over the territorial sea. In principle, the scope of the historic title emerging from the continued exercise of sovereignty should not be wider in scope than the scope of the sovereignty actually exercised. If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea. For instance if the claimant State allowed the innocent passage of foreign ships through the waters

Under international law, there is a critical distinction between inland waters and territorial seas. In inland waters, but not the territorial sea, the coastal nation may interfere with or bar "innocent passage" of foreign vessels (see pp. 28–29, *supra*). Innocent passage is navigation through waters to traverse them, including passage *en route* between the high seas and inland waters, so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage includes stopping and anchoring incidental to ordinary navigation or rendered necessary by *force majeure* or by distress. See Convention on the Territorial Sea and the Contiguous Zone, *supra*, 15 U.S.T. at 1610.

On the other hand, while "freedom of fishing" is a recognized right of foreign nations in the high seas,[39] in its territorial sea a coastal nation may properly regulate fishing and other activities by foreign na-

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claimed, it could not acquire an historic title to these waters as internal waters, only as territorial sea.

165. The seeming contradiction between the statement that "historic bays" are internal waters, and the conclusion that waters claimed on the basis of the exercise of sovereignty as over the territorial sea cannot be internal waters but only part of the territorial sea, is really one of terminology. In the latter case, it would be preferable not to speak of an "historic bay" but of "historic waters" of some other kind.

[38] If the evidence does not establish Cook Inlet as an historic bay, it is unnecessary for the Court to consider whether it establishes lower Cook Inlet as historic territorial sea, in which case Alaska would have no jurisdiction over it. See p. 30, *supra*.

[39] See, *e.g.*, Convention on the High Seas, April 29, 1958 [1962], 13 U.S.T. 2312, T.I.A.S. No. 5200. See generally I Shalowitz, *supra*, at 255–256, 259–264.

tionals.[40] See, *e.g.*, *Manchester* v. *Massachusetts*, 139 U.S. 240, 257. Indeed, the Convention on the Territorial Sea provides that passage of foreign fishing vessels is not innocent if they do not observe laws and regulations made and published by the coastal state "in order to prevent these vessels from fishing in the territorial sea." 15 U.S.T. at 1610.

Therefore, the nation's attempt to regulate navigation or fishing by foreign nationals is not necessarily evidence that it is treating the waters as inland waters in the absence of any declaration that it intends to do so. All that can be said with assurance is that it may have regarded the waters as part of its territorial sea. The *Louisiana Boundary Case* illustrates this well. The United States' enforcement of navigation rules against foreign vessels in the disputed coastal waters was "an accepted regulation of the territorial sea itself" and the Court therefore held that such enforcement "could not constitute a claim to inland waters," particularly since the rules were not intended as an assertion of such an international jurisdiction claim. 394 U.S. at 24–25, 27.

In sum, absent an explicit declaration, historic title to inland waters can be established only by evidence that the coastal nation has excluded foreign vessels from the waters in dispute, intending thereby to assert sovereignty over those waters as inland waters.

[40] In addition, a coastal nation may exercise jurisdiction over foreign fishing in the "contiguous zone" beyond its territorial sea (see p. 29, *supra*).

2. THERE HAS BEEN NO EXERCISE OF SOVEREIGNTY OVER COOK INLET AS OVER INLAND WATERS

Measured against the applicable principles, none of the events relied upon by Alaska and the lower courts constituted a relevant exercise of sovereignty over lower Cook Inlet as inland waters.

We can readily dispose of the two Russian actions, which took place prior to the purchase of Alaska by the United States in 1867. The Russian fur trader's cannon shot at a passing English vessel entering Cook Inlet in 1786 (Pet. App. 25a–26a) is meaningless. Only the acts of government, as distinguished from the unauthorized acts of private citizens, can establish sovereignty.[41] In any event, the three-mile limit to the territorial sea, which originated in the eighteenth century, was based on the range of a cannon shot from the shore. I Shalowitz, *supra,* at 25. The English vessel therefore was presumably not more than three miles from the shores of Cook Inlet and the most that can possibly be said about the incident is that it constituted an exercise of authority over the territorial waters within Cook Inlet, not over all of Cook Inlet as inland waters.

As to the Ukase issued by the Russian emperor in 1821, which declared Russian sovereignty over all waters within 100 miles from the entire coast of Alaska, Russia never enforced it and it was effectively aban-

[41] See *United States* v. *Louisiana*, *supra*, 394 U.S. at 76, n. 103 citing the *Juridical Regime* ¶ 95 (A. 742–743). The district court did not find that the Russian fur trader was a government agent or was acting under government direction (cf. Pet. App. 25a–26a).

doned after the United States and Great Britain protested the edict (pp. 5–6, *supra*).[42] As this Court held in *United States* v. *California, supra,* 381 U.S. at 174, a mere "declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish the claim" to historic title.

Aside from the foregoing,[43] nearly all of the events relied upon by Alaska and the courts below, including the seizure of Japanese vessels in the Shelikof Strait in 1962, involved the regulation of fishing. Thus, in its opinion the district court pointed to the enactment of the Alien Fishing Act of 1906, which prohibited fishing by aliens in the waters of Alaska under United States jurisdiction; the Executive Order in 1922 creating the Southwestern Alaska Fisheries Reservation and the regulations thereunder that applied to all of the waters of Cook Inlet; the White Act of 1924, which applied to the same area; and the promulgation of state fishing regulations, effective January 1, 1960, which applied to all of Cook Inlet (Pet. App. 14a–16a). In regard to all these measures, the district court noted that lower Cook Inlet was regu-

[42] Even the Ukase did not unequivocally assert sovereignty as over inland waters: it did not bar innocent passage entirely since it permitted passage by reason of *force majeure*, which is one of the elements of innocent passage (see p. 38, *supra*).

[43] The district court, in its findings of fact but not in its opinion, also noted the 1892 arrest of the *Kodiak* and the 1893 boarding of the *Olga* and *Mary Anderson* in lower Cook Inlet, but all of the vessels were American and, as we discuss at pp. 49–51, *infra*, enforcement actions against United States citizens cannot be relied upon to establish title to historic inland waters.

larly patrolled by the relevant enforcement authorities, that witnesses who conducted the patrols said they would have taken action against fishing by foreign vessels if they had encountered it; and that "numerous acts of enforcement of fishing regulations occurred" in lower Cook Inlet between 1924 and 1959 (*id.* at 15a–16a).[44]

But as the statement of facts indicates (pp. 9–10, *supra*), there is nothing to show that the Alien Fishing Act of 1906 or the White Act of 1924, which applied to Alaskan waters under United States jurisdiction, constituted an assertion of sovereignty over lower Cook Inlet: at the time these measures were passed, the United States considered its territorial sea (and hence its jurisdiction) as limited to three miles from the shores of bays with entrances wider than six miles (1906) or ten miles (1924) (see A. 13) and no exception, express or otherwise, was made by these Acts in regard to Cook Inlet.[45] As to the Southwestern Alaska Fisheries Reservation established in 1922, the area within the Reservation included portions of the high seas since the lines drawn on the accompanying maps were not intended to delineate territorial or inland waters (see pp. 9–10, *supra*). Our view of the

[44] In most instances, however, the enforcement actions were ultimately dismissed for one reason or another, so that sanctions were actually imposed only in perhaps two cases, both involving Americans (see p. 14, *supra*). The Shelikof Strait prosecutions also were ultimately dismissed (see p. 18, *supra*). Yet this Court has said that proceedings resulting in dismissals are of limited value as evidence of assertions of authority. See *United States* v. *California*, *supra*, 381 U.S. at 174.

[45] See, *e.g.*, H. Rep. No. 2485, 59th Cong., 1st Sess., pp. 3, 7–9.

limited office of these fisheries regulations is confirmed by the acts and assertions of those responsible for enforcing them when foreign vessels were actually found fishing in Cook Inlet: these officials did not understand the regulations to bar foreign fishing more than three miles from the shore of Cook Inlet (see pp. 13–14, *supra*).

Moreover, the fact that the United States and Alaska patrolled the waters of lower Cook Inlet beyond the three-mile limit in enforcing fisheries laws is in itself of no legal significance in this case. The regulation of fishing is a power a coastal nation may exercise in the territorial sea and beyond. Any nation may patrol even the high seas to enforce its own laws against those who are subject to them. As the Court held in *Skiriotes* v. *Florida, supra,* 313 U.S. at 77, "the United States may control the conduct of its citizens upon the high seas."[46] International consequences can arise only when the patrol activity results in enforcement actions directed against foreign nationals. But then it is the enforcement itself, not the fact that the waters were patrolled, that constitutes the relevant exercise of sovereignty.

If there is one salient fact in this case it is this: neither the United States nor Alaska has ever taken any enforcement action against a foreign vessel or foreign national in lower Cook Inlet. The district court relied upon the testimony of witnesses who speculated about what they would have done if for-

[46] In *Skiriotes*, the Court upheld a Florida statute regulating the taking of commercial sponges by citizens of the state from waters beyond the three-mile territorial limit.

eign vessels had fished in lower Cook Inlet (Pet. App. 15a). But this is hardly significant. The acts of sovereignty necessary to give rise to historic title must be public; they "must have the notoriety which is normal for acts of State. Secret acts could not form the basis of a historic title; the other State must have at least the opportunity of knowing what is going on." *Juridical Regime* ¶ 96 (A. 743). The unannounced intentions of a number of persons who patrolled Cook Inlet thus cannot be used as a basis for establishing historic title.

Of course, there could be a situation in which a nation's claim of historic title was so unambiguous, so well known internationally and so widely respected that no enforcement action was ever taken because none was necessary—foreign vessels simply avoided any penetration of the historic inland waters. But that is not the situation in regard to Cook Inlet. In 1962, before the Shelikof Strait incident, the Japanese fishing fleet sailed into lower Cook Inlet in search of fish. Prior to 1959, when Alaska became a state, federal fisheries agents saw foreign vessels navigating or at anchor in lower Cook Inlet but did not interfere with them (A. 16–17, 21, 262, 360–361, 456, 507–508, 545, 602), which reflects an understanding that such innocent passage was not subject to United States interference (cf. A. 772–776, 802–803, 1027)—an understanding perhaps consistent with a claim of historic territorial sea but inconsistent with Alaska's claim of historic inland waters. And, as the district court ac-

knowledged, Canadian vessels fished lower Cook Inlet during the 1940's and 1950's without incident.[47]

As against this, the district court relied upon a number of acts of enforcement against United States citizens fishing in lower Cook Inlet (Pet. App. 26a–34a). But as indicated above, these acts are not sufficient assertions of sovereignty to give rise to the international claim of historic title over inland waters. A nation may regulate the fishing activities of its citizens even on the high seas and, when it does so, it is not simultaneously asserting international jurisdic-

[47] In disregarding this evidence, the district court observed that the intrusions of Canadian halibut vessels inside Cook Inlet were infrequent (Pet. App. 44a–45a). But, if Canadians only infrequently desired to fish lower Cook Inlet, yet did so at will and without United States interference, this effectively repudiates a claim of historic title. As the *Juridical Regime* states ¶ 99 (A. 743) (emphasis supplied):

> It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. *It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken.*

Moreover, given the remote location of Cook Inlet, the relative infrequency of the known foreign fishing there is less significant than it would if the Inlet were located closer to a greater number of nations. Cf. *Juridical Regime* ¶ 117 (A. 745–746); Bouchez, *The Regime of Bays in International Law* 255 (1964). As it is, fishing vessels of two of the closest nations—Canada and Japan—have entered Cook Inlet (see pp. 13, 17, *supra*). Moreover, the unmolested voyages of Canadian vessels in Cook Inlet were not qualitatively more "infrequent and isolated" (Pet. App. 45a) than the purported exercises of sovereignty there beyond the three-mile limit (see pp. 10, 14, 20, *supra*).

tion over the area. See *Skiriotes* v. *Florida, supra.*[48] Only enforcement actions directed at foreign nationals can have international significance and only such actions can constitute the required exercise of sovereignty.[49] As the court stated in *Civil Aeronautics Board* v. *Island Airlines, Inc.*, 235 F. Supp. 990, 1004–1005 (D. Haw.), affirmed, 352 F. 2d 735, 741 (C.A. 9), sovereignty must be exercised by deeds such as "keeping foreign ships or foreign fishermen away from the area, or taking action against them" and "the *acts* must have notoriety which is normal for acts of the state."[50]

While Alaska's seizure of the Japanese vessels in the Shelikof Strait in 1962—which the district court thought to be "the clearest exercise of sovereignty" (Pet. App. 16a)—was indisputably an act of sovereignty directed at foreign nationals, the seizure

[48] As we discuss below, such acts directed against the nation's own citizens do not have the required international notoriety to constitute assertions of jurisdiction as over territorial or inland waters. See pp. 49–51, *infra.*

[49] Indeed, we believe this follows from the Court's instruction that the only way to apply the doctrines of historic bays in dispute between a state and the United States "is to treat the claim of historic waters as if it were being made by the national sovereign and opposed by another nation." *United States* v. *Louisiana*, *supra*, 394 U.S. at 77.

[50] Thus, we believe that the district court erred in relying upon: the attempted enforcement of Rev. Stat. 1956 against the *Kodiak* and other vessels in the 1890's; the Southwestern Alaska Fisheries Reservation and the White Act; enforcement of those fisheries restrictions through regulations and patrol, as well as arrests of Americans and seizures of American vessels in 1924 and the 1950's by the United States, and in the 1970's by Alaska; and the Gharrett-Scudder line (see pp. 6–20, *supra*).

occurred more than 75 miles from the Cook Inlet (see p. 18, *supra*). It therefore cannot be relied upon as an assertion of jurisdiction over the area in dispute here. And, as we discuss below (see p. 52, *infra*), Japan certainly did not acquiesce in Alaska's attempt to use this incident for the purpose of asserting jurisdiction over lower Cook Inlet.

In short, neither Alaska nor the United States has ever interfered with the innocent passage of a foreign vessel in lower Cook Inlet and yet only such interference would manifest to the international community that sovereignty was being asserted over lower Cook Inlet in a manner consistent with its treatment as historic inland waters.[51] No enforcement action of any kind under any of the numerous fishing regulations has ever been taken against a foreign vessel in lower Cook Inlet. There has been no express declaration by the United States that it regarded lower Cook Inlet as an historic bay. Any inferences that might be drawn to show the requisite exercise of sovereignty are so attenuated that other nations of the world could not have acquiesced in a historic claim. We now turn to that additional requirement for establishing the existence of an historic bay.

C. FOREIGN NATIONS HAVE NOT ACQUIESCED IN ASSERTIONS OF SOVEREIGNTY OVER COOK INLET AS INLAND WATERS.

As we discussed above (pp. 32–33, *supra*), the proponent of a claim of historic title to coastal waters as inland waters must establish that "the attitude of foreign

[51] As distinguished from historic territorial waters.

nations" toward the coastal state's assertion of sovereignty has been actual "acquiescence," rather than the mere absence of opposition. *United States* v. *California, supra,* 381 U.S. at 172; *United States* v. *Louisiana, supra,* 394 U.S. at 23.[52] Nations can manifest their acquiescence or nonacquiescence in another nation's assertion of sovereignty by deed as well as word. *Juridical Regime* ¶¶ 113–115 (A. 745); Bouchez, *supra,* at 271–273. In order for their action (or inaction) to be regarded as manifesting acquiescence, however, it must be reasonably clear to other nations that the coastal nation is attempting to assert sovereignty over the waters in question—in this case, as if they were inland waters. In this respect, the requirement that there be an exercise of sovereignty, discussed in the preceding section, is interrelated with the need for acquiescence by foreign nations.

Accordingly, to serve as a basis for a claim of historic title, a declaration or assertion of sovereignty must be open and notorious, clearly providing an occasion for protest or acquiescence. *Juridical Regime* ¶¶ 96, 125–130 (A. 743, 746–747); Bouchez, *supra,* at 262–264, 273–276, 278.[53] Yet here Alaska and the lower

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[52] The district court properly chose to apply, at least superficially, the more stringent test, *i.e.*, actual acquiescence (Pet. App. 17a–18a), but its application of that test was fatally tainted by its reliance upon supposed acts of sovereignty that, as we have argued above, were legally ineffective for international law purposes (see pp. 36–47, *supra*).

[53] The *Juridical Regime* asserts that acts of sovereignty must have meaningful "notoriety", *i.e.*, "the notoriety which is normal for acts of state." ¶¶ 96, 125–130 (A. 743, 746–747).

courts relied upon acts that were totally unpublicized (*e.g.*, boardings of American vessels in 1924, the destruction of the Tariff Commission maps in 1930, and transmission of the Gharrett-Scudder line to Canada in 1957) as well as domestic statutes, executive orders and regulations and enforcement actions against Americans of which foreign nations might learn only fortuitously.

The district court's reliance upon these internal exercises of authority not only is contrary to the principle of international law just cited, but also contradicts the position taken by the United States in resisting historic territorial claims of other nations. In 1957, when the Soviet Union issued a decree declaring the waters of Peter the Great Bay to be historic inland waters, the United States sent a note of protest warning against encroachments on the high seas and stating that a claim of historic title could not be based on "internal regulations of the Russian Government, which were not communicated to the Governments of other States."[54] As the Secretary of State observed in his letter to the Spanish Minister in 1863, regarding Spain's claim to maritime jurisdiction around Cuba: "Nations do not equally study each other's statute books and are not chargeable with notice of national pretentions resting upon foreign legislation."[55] Since

[54] 4 Whiteman, *Digest of International Law* 256 (1965). Russia had claimed that the "historic rights of Russia to the Bay of Peter the Great were confirmed in Rules of Maritime Fisheries In The Territorial Waters of the Governor-Generalship of Priamurye published by the Russian Government in 1901 * * *." *Id.* at 255.

[55] 1 Moore, *International Law Digest* 709, 710 (1906).

this case must be treated as if it were between the United States and an opposing nation (*United States* v. *Louisiana, supra,* 394 U.S. at 77), the district court erred in relying upon the internal statutes and regulations of the United States to establish historic title to lower Cook Inlet. Those regulatory measures would have been significant only if enforcement actions pursuant to them were taken against foreign nationals. *Juridical Regime* ¶¶ 89–90 (A. 742). No such actions occurred at any time.

In addition to being open and notorious, a coastal nation's declaration or assertion of sovereignty must be sufficiently clear and unambiguous to provide other nations with an occasion for protest or acquiescence. The other nations "must have at least the opportunity of knowing what is going on." *Id.* at ¶ 96 (A. 743). Thus, actions that could reasonably be regarded as merely as assertions of jurisdiction over the citizens of the coastal nation or others coming within its territorial waters are not adequate to provide a basis for acquiesence by foreign nations in an assertion of sovereignty as over inland waters.

Clarity is particularly necessary in regard to claims of historic title by the United States in light of this country's traditional foreign policy against seaward expansions of territorial jurisdiction (see pp. 33–35, *supra*). Aside from the Shelikof Strait incident, which we discuss below, there has been no such clear and unambiguous assertion of sovereignty. The various statutes and regulations upon which the courts below relied, are far from clear. Many inferences must

be drawn and elaborate arguments made in order even to reach the conclusion—which we believe erroneous—that sovereignty was in fact asserted over lower Cook Inlet. Yet a "definiteness which requires so much subtlety to expound is hardly definite."[56] Still less does it manifest to the international community a claim that lower Cook Inlet is part of an historic bay.

Thus, for reasons we have previously discussed (see pp. 41–42, *supra*), the Alien Fishing Act did not reflect an unequivocal intention to assert sovereignty over all of lower Cook Inlet as inland waters. The Gharrett-Scudder line involved foreign nationals to some degree, but the United States explicitly stated that this was not intended to delineate jurisdiction for international purposes (see pp. 16–17, *supra*). Similarly, acts of patrol more than three miles from the shore in lower Cook Inlet scarcely could be regarded by other nations as assertions of territorial sovereignty. The United States has domestic and international obligations that require it to engage in such patrol—even in the high seas—in order to enforce conservation measures against nationals of the United States and of other parties to such international agreements.[57]

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[56] *Screws* v. *United States*, 325 U.S. 91, 153 (dissenting opinion).

[57] The United States has many agreements with Canada and other nations concerning fisheries and other matters for which lines have been drawn beyond the usual three-mile limit. *E.g.*, International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 U.S.T. 380, 382, T.I.A.S. No. 2786; Interim Convention on Conservation of North Pacific

When Alaska did make a declaration of inland water sovereignty over lower Cook Inlet at the time of the Shelikof Strait seizures in 1962, Japan immediately protested. Thus the first and only clear assertion of sovereignty was met with an equally clear statement of nonacquiescence.

The nonacquiescence of foreign nationals [58] is confirmed by the reaction of the Canadian government to the decision of the court of appeals in this case. Canadian vessels have fished in Cook Inlet for decades without interruption (see p. 13, *supra*). Had the United States not sought the stay granted by the court of appeals, Canada was prepared to decline to renew a mutually important agreement with the United States on reciprocal fishing privileges,[59] in protest

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Fur Seals, February 9, 1957, 8 U.S.T. 2283, T.I.A.S. No. 3948. In its foreign relations, the United States does not claim that such lines constitute internationally significant territorial claims.

Patrol activities would not have constituted an international claim of sovereignty for the additional reason that the White Act and other laws (see, *e.g.*, p. 10, *supra*) prohibit importing fish or animals taken on the high seas under certain circumstances—domestic legislation for which patrol of the high seas is a necessary and proper means of enforcement, against both citizens and foreign nationals (cf. A. 1027).

[58] Cook Inlet is not among the historic waters identified in various comprehensive studies of the subject. See, *e.g.*, *Historic Bays, Memorandum by the Secretariat of the United Nations*, *supra*, at ¶¶ 12–43 (A. 693–698); Bouchez, *supra*, at 27–101; Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 383–439 (1927).

[59] See Agreement Between United States and Canada on Reciprocal Fishing Privileges, June 15, 1973, 24 U.S.T. 1729, T.I.A.S. No. 7676, which authorizes specified fishing by nationals of the respective parties in designated portions of the exclusive fishing zones established by the other party.

against any suggestion that Canadian vessels are not free to fish in lower Cook Inlet (Pet. App. 73a–81a). Only after the United States agreed to seek a stay did Canada renew the agreement (May 8, 1974, T.I.A.S. No. 7818).[60]

D. THE LOWER COURTS FAILED TO GIVE PROPER EFFECT TO THE UNITED STATES' DISCLAIMERS OF HISTORIC TITLE TO LOWER COOK INLET AS INLAND WATERS

In disputes between a state and the United States involving the Submerged Lands Act, it must be determined whether the United States has asserted, in regard to its foreign relations position, a limited claim of jurisdiction over the area in question that is inconsistent with the state's claim of historic title. *United States* v. *California, supra,* 381 U.S. at 175; *United States* v. *Louisiana, supra,* 394 U.S. at 76–77. Obviously, resolution of an international controversy over particular waters determines this country's territorial boundaries but the controversy would be unlikely to arise if the United States had disclaimed his-

[60] Another "essential" requirement for establishing historic title to inland waters is that the coastal nation's exercise of authority be "continuous" for a "considerable time." *Juridical Regime* ¶ 103 (A. 743). In our view, of course, the issue of continuity need not be reached because the other two requirements—exercise of sovereignty and acquiescence by foreign nations—have not been met. It is significant, however, that federal fishing agents observed foreign vessels navigating or at anchor in lower Cook Inlet and yet took no action and that Canadian fishing occurred in Cook Inlet in the 1940's and 1950's (p. 13, *supra*), which indicates that even if there was some assertion of sovereignty as over inland waters, it was not continuous.

toric title.[61] The disclaimer, which reflects foreign policy, therefore must be taken into account in internal disputes involving the Submerged Lands Act, particularly since reference to the Convention on the Territorial Sea and the Contiguous Zone for the purpose of defining "inland waters" has the effect of establishing "a single coastline for both the administration of the Submerged Lands Act and the conduct of our *future* international relations * * *." *United States* v. *California, supra,* 381 U.S. at 165 (emphasis supplied).

Such disclaimers may take many forms: formal legislative or executive declarations; statements by State Department officials with appropriate responsibilities; assertions of limited jurisdictional claims in litigation; and conduct by the United States concerning the waters in dispute, or acquiescence in the conduct of other nations, that is inconsistent with the jurisdictional claim of the state. Whatever the form, this Court has held that disclaimers of jurisdiction by the United States—even those asserted only in the litigation—are conclusive if the evidence of historic title is "questionable." *United States* v. *California, supra,* 381 U.S. at 175 (disclaimer consisted of position asserted by United States in this Court).

However, a disclaimer by the United States will not be conclusive if its effect would be to force "contraction of a State's recognized territory," because

[61] If, after disclaiming sovereignty, the United States later asserted that historic title had ripened, the disclaimer would be telling—if not conclusive—evidence against the assertion.

the United States cannot abandon its consistent, official international stance "solely to gain advantage in a lawsuit to the detriment of [the state] * * *." *United States* v. *Louisiana, supra,* 394 U.S. at 74, n. 97 (quoting *United States* v. *California, supra,* 381 U.S. at 168). Accordingly, a disclaimer will not necessarily "prevent recognition of a historic title which may already have ripened because of past events" if "'the historic evidence was clear beyond doubt.'" *United States* v. *Louisiana, supra,* 394 U.S. at 77, n. 104 (quoting *United States* v. *California, supra,* 381 U.S. at 175).[62]

Here the United States has repeatedly disclaimed historic title to lower Cook Inlet as inland waters, not only through the position asserted in this litigation, but on other occasions. At the time of the Shelikof Strait incident in 1962, the Legal Adviser of the State Department wrote that "[t]here is no basis for the assertion by Alaska of a claim to all of Cook Inlet as historic waters" (A. 757). In 1969, the Legal Adviser reiterated that "[i]n its conduct of foreign relations the Department of State does not consider that Cook Inlet is an historic bay" (A. 760). In 1970, the Secretary of State wrote that the United States Department of State knew no basis for claims of historic title to any area like Cook Inlet that would not qualify as a juridical bay (A. 829). In all instances the

[62] See also the recent Special Master's Reports in *United States* v. *Louisiana*, No. 9, Original, pp. 16–19 (July 31, 1974); *United States* v. *Florida*, No. 52, Original, pp. 41–46 (January 18, 1974).

position taken concerning Cook Inlet was consistent with that asserted internationally.

Finally, in 1971 the United States published a set of maps delineating all its claims to territorial sea, the contiguous zone, and certain inland waters of the United States, in which the high seas are shown as penetrating into the portions of lower Cook Inlet claimed here by Alaska (see A. 761). Prepared by the government's Committee on Demarcation of United States Boundaries (a committee of the Interagency Law of the Sea Task Force), these charts reflect an official determination of what the United States regards as its coastline and the waters subject to its jurisdiction; as such they have been distributed to foreign governments and are available to the general public (A. 326–327).[63] (Other charts in this series have been treated as authoritative disclaimers of sovereignty by the Special Masters in *United States* v. *Florida,* No. 52, Original, *supra,* at 42, and *United States* v. *Louisiana,* No. 9, Original *supra,* at 17.)

The district court disregarded the disclaimers[64]

[63] In response to Alaska's comments about the accuracy of the delineation of the Alaskan coastline, the Acting Secretary of State wrote in 1971 that the lines were "[d]rawn in a manner consistent with the provisions of the Convention on the Territorial Sea and the Contiguous Zone and longstanding U.S. policies concerning the interpretation of the Convention" (A. 884–887).

[64] The district court took no account of the position asserted by the United States in this litigation, concluding that the allegations of the complaint "are not effective disclaimers" (Pet. App. 47a). That ruling, however, is contrary to this Court's treatment of litigation positions in other cases as being sufficient disclaimers. See, *e.g.*, *United States* v. *California*,

on the ground, *inter alia,* that it was "clear beyond doubt" that historic title had already ripened prior to the first disclaimer in 1962 (Pet. App. 13a, 45a, 51a–52a).[65] However, as we have argued above, the evidence of historic title relied upon by the district court was legally insufficient. While we therefore believe that Cook Inlet is not an historic bay, short of this it is at least certain that the ripening of historic title was far from "clear beyond doubt."[66] Indeed, the court of appeals itself observed "that the question of determining the ultimate inferences to be drawn [from the evidence] was close" (*id.* at 5a).

In a case such as this, "with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive." *United States* v. *California, supra,* 381 U.S. at 175.

The district court, however, gave an additional reason for refusing to credit the disclaimers: the court

supra, 381 U.S. at 175; Special Master's Report, *United States* v. *Louisiana*, No. 9, Original, *supra*, at 16.

[65] The court failed to explain how it could nevertheless rely upon the Shelikof Strait incident as the "clearest exercise of sovereignty" when that incident took place only a few weeks before the Legal Adviser issued the disclaimer in 1962 (compare Pet. App. 16a, 39a–41a, with *id.* at 12a, 45a–46a).

[66] As late as 1966, even Alaska may not have been convinced that all of Cook Inlet was internal waters of Alaska. Thus, in adopting a twelve-mile exclusive fisheries zone for the United States (see p. 29, *supra*), Congress relied in part upon Alaska's assertion that such a limitation "will clearly allow the closure to foreign encroachment of over 15 large bays and passes * * * such as Cook Inlet * * *." S. Rep. No. 1280, 89th Cong., 2d Sess., p. 2.

deemed them to be of "low reliability" in view of the "circumstances under which they were prepared" (Pet. App. 12a), in that "they were hastily prepared, [and] based on questionable research * * *" (*id.* at 45a).[67]

But even if that were an accurate characterization,[68] it ignores the fact that a disclaimer of jurisdiction reflects more than just a detailed examination of history or extended legal analysis. A disclaimer necessarily represents "the considered decision of the United States" concerning its borders and relations with other nations—a decision that it would be "inappropriate" for the courts to review or overturn. *United States* v. *Louisiana, supra,* 394 U.S. at 73; see also *Ex parte Peru,* 318 U.S. 578, 588–589 (suggestion of

[67] The court also asserted that the disclaimers were "offered in a self-serving effort by the federal government to have the Court disregard historic facts * * *" (Pet. App. 45a). The court cited no evidence in support of that assertion (compare *id.* at 46a–47a), and, as we have noted (see pp. 33–35, 55–56, *supra*), the disclaimers are consistent with other United States policies with conduct of its foreign relations. The "self-serving" characterization could equally be applied to the government's position in any federal-state dispute over coastlines since it is the responsibility of the federal government to determine international policy on this subject. This Court's acceptance of the disclaimer in the *California* case (see p. 54, *supra*) makes this inevitable criticism inconsequential.

[68] We assume *arguendo* that it is. However, we believe that the decision-making process underlying the disclaimers "should never have been subjected to this examination." *United States* v. *Morgan,* 313 U.S. 409, 422. The district court overruled the government's objection to the introduction of evidence concerning the work done by the principal draftsman of the original disclaimer (R. 3208) ("R." refers to the numbered pages of the district court record).

immunity of foreign nations). Indeed, this is why determinations by the political branches about the territorial extent of United States sovereignty are ordinarily binding on the judiciary. See *Jones* v. *United States*, 137 U.S. 202, 212; *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 380.

It cannot be doubted that the position taken by the United States concerning the status of waters off its coasts may be substantially affected by foreign relations considerations, such as the significance of the waters, the identity of the other nations likely to use those waters and our relationship to them, and whether the position taken by the United States would prejudice its claims that similar waters adjacent to other nations are high seas. Abram Chayes, the Legal Adviser to the State Department in 1962 when the first disclaimer was prepared, testified that this country's view of the status of lower Cook Inlet affected the position taken by the United States in regard to Canadian claims to historic waters in the Gulf of St. Lawrence and that it "was extremely important to us that we should be as pure in our own claims as we were insisting that Canada should be with respect to her claims." [68]

But because of the inherently political character of a disclaimer, the only proper question was whether the United States had made a relevant disclaimer of sov-

[68] Chayes Dep. 19–20. While we believe that the district court should not have looked beyond the face of the disclaimers (see p. 58, *supra*, n. 68), once it did so it should have respected the foreign policy considerations indicated by the former Legal Adviser's testimony.

ereignty, not whether it was "right" or whether enough research went into the decision. Cf. *Jones* v. *United States, supra,* 137 U.S. at 221. The disclaimers, as we stated above, represent the foreign policy of the United States in regard to the status of Lower Cook Inlet and are therefore entitled to great weight. And, where the evidence of historic title is as doubtful as it is here, the disclaimers should be given effect, as this Court held in *United States* v. *California, supra.*

CONCLUSION

The courts below treated as significant for international law purposes a variety of actions that heretofore neither the United States nor other nations would have regarded as establishing a claim of sovereignty over Cook Inlet as inland waters. Such a ruling by a United States court, nothwithstanding the contrary disclaimers, constitutes a potential embarrassment and burden to the United States in the conduct of its foreign relations on the sensitive subject of rights of littoral nations over coastal waters (see Pet. App. 67a–81a). The implications of the decision below for the rights of Canadian vessels to fish in lower Cook Inlet constitute, in Canada's eyes, a substantial and deleterious change of well-established understandings (*id.* at 73a–81a). The United States does not regard lower Cook Inlet as an historic bay and yet, if the decision below is permitted to stand, it will be seen by the other nations of the world as a declaration that the United States now regards all of Cook Inlet as inland

waters.[70] For the reasons discussed above, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[70] The Department of State, after reviewing the findings of fact in this case, is of the opinion "that there is no evidence of any act which could establish a claim [to Cook Inlet as historic internal waters] based on the applicable international criteria" (Pet. App. 69a). Moreover, the State Department is "loath to make [such] an international assertion," thereby changing the position maintained by the United States internationally, because "[t]o do so could have serious adverse implications for our foreign relations" (*ibid.*) by making it more difficult to resist claims of other nations to extensions of their sovereignty and by impairing our existing rights to navigation and overflight (*id.* at 70a).

Appendix A

(Plaintiff's Exhibit 57*)

The Ambassador of Japan presents his compliments to The Honorable the Secretary of State and, with reference to the recent incident involving Japanese fishing boats off the coast of Alaska, has the honor, under instructions from his Government, to make the following representation.

1. A fishing fleet, consisting of the mother ship Banshu Maru No. 31 and five catcher boats, of the Higashi Taiheiyo Gyogyo K. K. (East Pacific Fisheries Company), was engaged in herring fishing in the Shelikof Strait lying between the Alaska Peninsula and Kodiak Island. On April 14, at about 1930 o'clock, the Alaska state authorities seized the catcher boat Ohtori Maru No. 5, which was temporarily anchored off Uganik Bay. At about 2110 o'clock of the same day, these authorities arrested Mr. Hanasaki, captain of the mother ship, who had hastened to the scene of seizure. At about 2330 o'clock of April 15, the same authorities proceeded to seize the catcher boat Tairyo Maru No. 61, which was temporarily anchored off Uyak Bay. The state authorities kept the captains and the ships concerned under detention until about 1030 o'clock of April 19, at which time the men were set free on bond, and the ships released, after being made to agree that the fleet would not conduct fishing operations in Shelikof Strait and Cook Inlet. The Alaska State authorities have indicted the captains of the Banshu Maru No. 31, the Ohtori Maru

* This exhibit was inadvertently omitted from the Appendix.

No. 5, and the Tairyo Maru No. 61, on the charges of violating Alaska state fishing laws and are going to put them on trial.

2. It appears that the above action of the Alaska state authorities is based on the position that the Shelikof Strait is an inland water of the United States of America. However, according to the opinion of the Government of Japan, it is clear that the Shelikof Strait is a part of the open sea, since there are no grounds whatsoever for recognizing that Strait as an inland water of the United States in the rules of international law. It is our understanding that the Government of the United States has never officially proclaimed this Strait to be an inland water. Attention is also invited to a report in a fishing industry periodical of the Soviet Union that a Soviet dragnet fishing boat operated in the waters of the Gulf of Alaska, including the Shelikof Strait, from March to May of 1961. Furthermore, the positions advanced by both the Japanese Government and the United States Government as regards the distance of the entrance of a bay which is to be considered an inland water has been ten nautical miles. It is considered that this principle will not be altered until the Geneva Convention on the Law of the Sea comes into effect.

3. It goes without saying that the United States of America has no jurisdiction over Japanese fishing boats in the open sea. As for the Ohtori Maru No. 5, the place of seizure has not been exactly known but the Government of Japan reserves its right to protest in case it is established that the seizure took place in the open sea. As for the Banshu Maru No. 31 and the Tairyo Maru No. 61, the Alaska state authorities have maintained that the operations of these ships in the open sea constituted a violation of Alaska state fishing laws. It is

obvious that Alaska state laws cannot be applied to activities of Japanese nationals in the open sea. Captain Hanasaki of the Banshu Maru No. 31 was arrested when he approached the Ohtori Maru No. 5 to look into the emergency caused by the seizure of that ship, although the captain had been in the open sea. It is understood that the Tairyo Maru No. 61 was likewise seized in the open sea. Inasmuch as these actions of the Alaska state authorities constitute a violation of the international law, the Government of Japan hereby protests to the Government of the United States and requests that the court actions against the captains of the Banshu Maru No. 31 and the Tairyo Maru No. 61, as well as those against the captain of the Ohtori Maru No. 5, in case it is found that the Ohtori Maru was seized in the open sea, be immediately suspended and the case be dismissed.

4. Fishing in the open sea is free with the exception of obligations imposed by international treaties. Under the International Convention for the High Seas Fisheries of the North Pacific Ocean, Japan is under obligation to voluntarily abstain from the fishing of salmon and halibut in the Gulf of Alaska area. However, the Japanese people have the right to fish for other kinds of fish in those waters. The commitment made by the Higashi Taiheiyo Gyogyo K. K. (East Pacific Fisheries Company) to the Alaska state authorities to abstain from operations in the Shelikof Strait and the Cook Inlet was made without the knowledge of the Government of Japan. Therefore, such a commitment does not in any way affect the position of the Government of Japan towards future fishing operations of Japanese nationals in those waters. The Government of Japan further protests the fact that the Alaska state authorities unduly ex-

tracted such a commitment from the Japanese fishing fleet by threatening the seizure of the entire fishing fleet.

5. It is surmised that it is the position of the Government of the United States that the status of the Shelikof Strait will be decided upon in United States courts. However, the scope of the territorial waters of a nation is defined by rules of the international law. It must be pointed out that, even if the Government of a certain nation, or its courts, should unilaterally proclaim waters beyond the limits prescribed by international law as its territorial waters, such proclamations cannot have any binding power on another nation, or its nationals, who do not recognize such actions.

6. The Government of Japan reserves the right to request the Government of the United States to compensate for all damages incurred in the past or to be incurred in the future by Japanese nationals in connection with the recent actions of the Alaska state authorities.

7. The Government of Japan is deeply concerned with the effects of the recent unilateral actions of the United States upon friendly relations between the two countries, and requests the Government of the United States to take appropriate steps immediately.

EMBASSY OF JAPAN.

WASHINGTON, *May 3, 1962.*

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